Kengathevy a/p Kularatnam v Varatharatnam a/l Kularatnam

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B–02(IM)–782–04 OF 2012
MOHD HISHAMUDIN, CLEMENT SKINNER AND AZIAH ALI JJCA
3 OCTOBER 2013

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Civil Procedure — Summary judgment — Contract — Agreement for defendant to pay 40% of proceeds of sale land to plaintiff — Refusal to pay promised share upon sale of land — Application for summary judgment for promised share allowed — Appeal against summary judgment

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Contract — Breach — Agreement — Contract in form of statutory declaration — Agreement for defendant to pay 40% of proceeds of sale of land to plaintiff — Refusal to pay promised share upon sale of land — Application for summary judgment for promised share — Defence that defendant not well-versed in English and did not understand statutory declaration — Whether defence bona fide

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In the High Court, the respondent ('the plaintiff') claimed against the appellant ('the defendant') for breach of contract. The contract was written in the form of a statutory declaration made by the defendant in which the defendant agreed to pay 40% of proceeds of the sale of a piece of land ('the said land') to the plaintiff, in the event the land was sold. The said land was eventually sold but the defendant refused to give the promised 40% share to the plaintiff. Before the High Court, the plaintiff applied for summary judgment pursuant to O 14 ('O 14 application') against the defendant for the sum of RM117,332,50, being 40% of the proceeds of the sale of the land of RM300,000. In her defence, the defendant averred that there was an agreement between her and the plaintiff that she needed consent of the plaintiff to sell the land; and that it had been agreed by all the family members that the land be sold and that the proceeds be shared among the family members in a prescribed manner. In her affidavit in opposition of the plaintiff's O 14 application, the defendant further alleged that she was not well-versed in the English language and was not given a comprehensive interpretation of the statutory declaration by the plaintiff. The application was allowed and hence, the present appeal.

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Held, dismissing the appeal with costs of RM20,000:

(1) The defendant did not establish a bona fide defence in her affidavit in opposition as she did not deny signing the statutory declaration. In her

statement of defence, she also did not claim to be not well-versed in the English language. The statement of defence pertaining the statutory declaration was brief and vague. However, significantly, there was an implied admission in the statement of defence that the defendant did sign the statutory declaration. Yet, the defendant's affidavit was a radical departure from her statement of defence and even implied, contrary to documentary evidence, that the statutory declaration was never attested before the commissioner for oaths. The court would not allow a party to use an affidavit to rectify any deficiency in his/her pleading or to contradict his/her pleading (see paras 13–17).

[Bahasa Malaysia summary

Di Mahkamah Tinggi, responden ('plaintif') menuntut terhadap perayu ('defendan') untuk kemungkiran kontrak. Kontrak ditulis dalam bentuk perisytiharan statutori yang dibuat oleh defendan di mana defendan bersetuju untuk membayar 40% hasil daripada jualan sebidang tanah ('tanah tersebut') kepada plaintif, jika tanah tersebut dijual. Tanah tersebut akhirnya dijual tetapi defendan enggan memberi syer 40% yang dijanjikan kepada plaintif. Di hadapan Mahkamah Tinggi, plaintif memohon untuk pengakiman terus berikutan A 14 ('permohonan A 14') terhadap defendan untuk wang sejumlah RM117,332,50, sebagai 40% daripada hasil jualan tanah sebanyak RM300,000. Dalam pembelaannya, defendan berhujah bahawa terdapat perjanjian antara dia dan plaintif yang dia perlukan izin plaintif untuk menjual tanah; dan ia telah dipersetujui oleh kesemua ahli keluarga bahawa tanah tersebut dijual dan hasil dikongsi antara ahli-ahli keluarga di dalam cara yang telah ditetapkan. Dalam afidavit bantahan terhadap permohonan A 14 plaintif, defendan selanjutnya mendakwa bahawa dia tidak mahir dalam Bahasa Inggeris dan tidak diberi tafsiran yang komprehensif terhadap perisytiharan statutori oleh plaintif. Permohonan tersebut dibenarkan dan maka rayuan ini.

Diputuskan, menolak rayuan dengan kos sebanyak RM20,000:

(1) Defendan tidak membuktikan pembelaan bona fide di dalam afidavit bantahan memandangkan dia tidak menafikan menandatangani perisytiharan statutori tersebut. Dalam pernyatan pembelaannya, dia tidak mendakwa untuk tidak mahir dalam Bahasa Inggeris. Pernyataan pembelaan berkaitan perisytiharan statutori adalah pendek dan kabur. Walau bagaimanapun, terdapat pengakuan tersirat dalam pernyataan pembelaan bahawa defendan telah menandatangani perisytiharan statutori tersebut. Tetapi afidavit defendan adalah penyimpangan radikal daripada pernyataan pembelaannya dan juga tersirat, bertentangan keterangan dokumentar, bahawa perisytiharan statutori tidak pernah diakui di hadapan pesuruhjaya sumpah. Mahkamah tidak akan membenarkan pihak untuk menggunakan afidavit untuk

memperbetulkan apa-apa kekurangan dalam plidingnya atau untuk menyangkal plidingnya (lihat perenggan 13–17).]

Notes

For cases on agreement, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3106–3137.

For cases on contract, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 8563–8581.

Legislation referred to

Rules of the High Court 1980 O 14

Appeal from: Civil Suit No S-22–976 of 2010 (High Court, Shah Alam)

N Chandran (Rajan Chandran and Naraendran with him) (The Chambers of Naraendran) for the appellant.

Gurdit Singh (C Ramasamy with him) (Sharif & Khoo) for the respondent.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] This appeal was called up together with Civil Appeal No B-02 (IM)-783–04 of 2012 ('Civil Appeal 783'), an appeal that arises from the same decision (of 5 October 2011) and involving the same appellant and respondent as the present appeal. At the commencement of the present appeal, it was agreed by parties that the decision of this appeal would bind Civil Appeal 783.

[2] This appeal is against the decision of the High Court of Shah Alam of 5 October 2011.

[3] On 4 October 2012, we unanimously dismissed the appeal with costs.

[4] We now give our grounds.

[5] The appellant is the first defendant at the High Court. The appellant's appeal is against the decision of the High Court in granting the respondent (the plaintiff at the High Court) an O 14 summary judgment against the appellant.

[6] Hereinafter in this judgment, for convenience, the appellant/first defendant shall be referred to just as 'the defendant'; and the respondent shall be referred to as 'the plaintiff'.

[7] We, having heard the appeal, found that the defendant has failed to establish any triable issue; hence, the learned judicial commissioner was correct in law in granting summary judgment.

[8] The claim of the plaintiff against the defendant is for the breach of a written contract. The written contract is in the form of a statutory declaration made by the defendant before a commissioner for oaths. In the statutory declaration, the defendant agrees to pay the plaintiff 40% of the proceeds of the sale of a piece of land in the event the land is sold. The land in question was eventually sold to a purchaser for RM300,000. However, having sold the land, the defendant now refused to give the plaintiff his 40% share of the proceeds of the sale, as agreed by the defendant in her statutory declaration.

[9] The plaintiff and the defendant are siblings. They are brother and sister; the plaintiff being the younger brother to the first defendant (the sister). Their mother (Mdm Thangponnu, now deceased) was the registered owner of a piece of land in the District of Kajang (the land in question); however, she held the land as trustee for the benefit of her daughter, the defendant. Although the plaintiff is not a beneficiary under the trust, nevertheless there is a family arrangement that he kept the title to the land; and there was also an agreement between the plaintiff and the defendant that in the event that the defendant (that is, the sister, Kengathevy) wishes to sell the land, she would require the consent of the plaintiff (that is, her younger brother, Varatharatnam). Now, some time in early February 2010, the defendant informed the plaintiff that she was in need of money and needed his consent to sell the land. The plaintiff gave his consent. But it was, however, agreed between the plaintiff and the defendant that in return for the giving of the consent, the defendant (Kengathevy) would give the plaintiff (Varatharatnam) 40% of the proceeds of the sale. This oral agreement was subsequently formalised in writing in the form of the aforesaid statutory declaration.

[10] It must be pointed out here that apart from the plaintiff and the defendant, there are two other siblings of the parties, namely, one Seetha Devi (a sister of the plaintiff/defendant) and one Suhirtharatnam (a brother of the plaintiff/defendant).

[11] Before the High Court, the plaintiff applied for summary judgment against the defendant for the sum of RM117,332.50 (being 40% of the proceeds of the sale of the land of RM300,000). The learned judicial commissioner granted the application.

[12] Hence, the present appeal before this court.

[13] The defendant in her statement of defence denies that there was an agreement between her and the plaintiff that she needed the consent of the plaintiff in order to sell the land. She further alleges that (see para 6.4 of the

statement of defence) it had been agreed between all the family members, namely:

(a) Mdm Thangaponnu (the mother);

(b) the plaintiff;

(c) the defendant;

(d) Seetha Devi; and

(e) Suhirtharatnam,

that the land be sold and that the proceeds of the sale be shared amongst the family members in the following manner:

(a) Mdm Thangaponnu would get 16% of the proceeds of the sale;

(b) the plaintiff would get 8%;

(c) the defendant would get 60%;

(d) Seetha Devi would get 8%; and

(e) Suhirtharatnam would get 8%.

[14] However, in her affidavit resisting the plaintiff's O 14 application, the defendant now alleges that she was not well versed in the English language and was not given a comprehensive interpretation of the statutory declaration by the plaintiff. She alleges that at the time of signing the statutory declaration, the plaintiff explained to her that it is stated in the statutory declaration that the proceeds of the sale would be shared between her and their mother in the following manner:

(a) 60% of the proceeds to the defendant; and

(b) 40% of the proceeds to the mother, Mdm Thangponnu.

[15] In our judgment, the defendant's affidavit in opposition does not establish a bona fide defence. This is because in her statement of defence the defendant does not deny signing the statutory declaration before a commissioner for oaths. Also, in her statement of defence, she does not at all claim to be not well versed in the English language. As far as the statutory declaration is concerned, the statement of defence only contains the following vague averment:

> 7. Defendan Pertama dan Defendan Kedua menafikan perenggan-perengan 9.1, 9.2 dan 10. Selanjutnya, Defendan Pertama dan Kedua menyatakan seperti berikut:
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> 7.1 Defendan Pertama telah menandatangani Surat Akuan Berkanun

bertarikh 5.2.2010 tersebut di bawah tanggapan bahawa Plaintif akan membahagikan 40% tersebut mengikut perenggan 6.4 Pernyataan Pembelaan ini.

[16] That is all. Thus, we have a statement of defence pertaining to the statutory declaration that is brief and vague. But, significantly, there is an implied admission in the statement of defence that the defendant signed the statutory declaration before a commissioner for oaths. Yet,now we have the defendant's affidavit that is a radical departure from her statement of defence, and even implying (contrary to the documentary evidence) that the statutory declaration was never attested before a commissioner for oaths. It is elementary that a court will not allow a party to use an affidavit to rectify any deficiency in his/her pleading or to contradict his/her pleading.

[17] Appeals dismissed with costs of RM20,000 for both appeals.

Appeal dismissed with costs of RM20,000.

Reported by Afiq Mohamad Noor